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In the Supreme Court of the United States

OCTOBER TERM, 1958

No.—

UNITED STATES OF AMERICA, PETITIONER

v.

SYDELLE PRICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals (Appendix, *infra*, pp. 13–19) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 2, 1959. (Appendix, *infra*, p. 20.) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the issuance of a 90-day notice of deficiency (provided for in Section 272(a)(1) of the 1939

Code) is essential to the validity of an assessment of federal income taxes where, prior to assessment, the taxpayer has filed (as provided in Section 272(d) of that Code) a waiver of restrictions on assessment and collection.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

> SEC. 272. PROCEDURE IN GENERAL.
>
> (a)(1) [as amended by Sec. 203 of the Act of December 29, 1945, c. 652, 59 Stat. 669] *Petition to the Tax Court of the Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of Section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in

force may be enjoined by a proceeding in the proper court. * * *

* * * * *

(d) *Waiver of restrictions.*—The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency.

* * * * *

(26 U.S.C. 1952 ed., Sec. 272.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

¶ Sec. 29.272–1. *Assessment of a Deficiency.*—
* * *

* * * * *

¶ (5) The taxpayer may at any time by a signed notice in writing filed with the Commissioner waive the restrictions on the assessment of the whole or any part of the deficiency. The notice must in all cases be filed with the Commissioner. The filing of such notice with the Tax Court does not constitute filing with the Commissioner within the meaning of the Internal Revenue Code. After such waiver has been acted upon by the Commissioner and the assessment has been made in accordance with its terms, the waiver cannot be withdrawn.

* * * * *

STATEMENT

The essential facts are undisputed and may be summarized as follows:

On August 18, 1949, the Commissioner of Internal Revenue received a United States Treasury Form 870 executed by taxpayer pursuant to the provisions of Section 272(d) of the Internal Revenue Code of 1939, in which she waived the restrictions provided in Section 272(a) of the Code, and consented to the assessment and collection of a deficiency in income tax for the calendar year 1946 in the sum of $9,965.48, together with statutory interest. (R. 14, 26.) Thereafter, on October 14, 1949, the Commissioner assessed income taxes for the taxable year 1946 against taxpayer in the sum of $9,965.48, plus interest of $1,498.09, or a total of $11,463.57. On January 12, 1950, taxpayer paid $1,500 on this assessment, leaving a balance due of $9,963.57. (R. 16–20, 26, 27.) The Commissioner did not issue a statutory notice of deficiency for the tax in question.[1]

On March 14, 1956, the United States instituted suit in the United States District Court for the District of Arizona seeking judgment against taxpayer for unpaid taxes amounting to $9,963.57. (R. 3–5.) That court held that the filing of a waiver by taxpayer prior to the determination "of an assessment" by the Commissioner was premature and invalid, and that consequently the Commissioner was not relieved of the requirement, imposed by Section 272(a), of issuing a notice of deficiency to taxpayer with respect to the taxes for which the United States sought judgment. (R. 28, 32.) Accordingly, the District Court dis-

[1] On December 16, 1949, he did issue a notice to taxpayer asserting deficiencies in penalties for the taxable year, 1946, under Sections 291(a) and 293(a) of the Code, in the respective amounts of $2,491.37 and $498.27. (R. 26–27.)

missed the complaint. (R. 33.) The Court of Appeals affirmed. (Appendix, *infra*, p. 20.)[2]

REASONS FOR GRANTING THE WRIT

Section 272a(1) (*supra*, p. 2–3) declares that if there is a deficiency in tax the Commissioner is authorized to send the taxpayer a notice of such deficiency. Within 90 days of the mailing of such notice, the taxpayer may petition the Tax Court for a redetermination. During that same 90-day period, the Commissioner is barred from assessing or collecting the tax.

These procedures, however, are not inflexible. Subsection (d) (*supra*, p. 3) goes on to provide that "taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) * * * on the assessment and collection of the whole or any part of the deficiency."

The Government has long assumed, on the basis of Section 272(d), that if (as in this case) an agent makes a preliminary determination that there is a deficiency of a certain amount of tax and if the taxpayer signs a waiver as to the collection and assessment of that sum, there is no need to send a statutory notice of deficiency—no need, otherwise stated, to set in motion the procedures by which taxpayer might seek a redetermination. Thus, in *Associated Mutuals* v. *Delaney*, 176 F. 2d 179, 183 (C.A. 1st), Chief Judge Magruder referred to "the long-standing administra-

[2] If the Government's assessment was invalid, collection of the taxes involved is barred by limitations. Section 275(a) of the 1939 Code.

tive practice not to send deficiency notices if a waiver had already been filed by the taxpayer * * *."

According to the Ninth Circuit's decision in the instant case, this practice is not permissible. The court holds that, since the Commissioner did not send a deficiency notice, he could not proceed to assess and collect even though taxpayer had expressly consented to the assessment and collection of the sum involved. The court reasoned that until a determination of deficiency is made by the Commissioner and a statutory notice mailed, the waiver provisions do not come into play. Accordingly, it concluded, the waiver executed in this case was premature and invalid.

This holding is in direct and recognized conflict with decisions of other circuits (Appendix, *infra,* p. 19). We believe further that it is contrary to the language and purpose of Section 272(d). Finally, as we shall point out, the issue is of substantial practical importance, notwithstanding the fact that changes have been made in the 1954 Code.

1. The decision below takes note (Appendix, *infra,* p. 19) of the fact that a "contrary rule" was adopted by the First and Sixth Circuits in *Associated Mutuals* v. *Delaney,* 176 F. 2d 179, and *Moore* v. *Cleveland Ry.* Co., 108 F. 2d 656, respectively.[3] It is also in conflict with a decision of the Court of Claims. *Roos* v.

[3] The court below relied upon its own prior decisions in *Mutual Lumber Co.* v. *Poe,* 66 F. 2d 904, certiorari denied, 290 U.S. 706, and *McCarthy Co.* v. *Commissioner,* 80 F. 2d 618, certiorari denied, 298 U.S. 655, decisions which were characterized in the *Delaney* case, *supra* (176 F. 2d at 184), as involving "different problems."

United States, 31 F. Supp. 144.[4] It finds no support in the decisions of any other circuit.

In the *Delaney* case, *supra*, a taxpayer sought to enjoin a Collector from prosecuting proceedings for the collection of taxes. As here, an internal revenue agent had found a deficiency and taxpayer had signed a waiver of restrictions on the assessment and collection of the deficiency found. As here, taxpayer urged that the waiver was ineffective because no formal notice of deficiency had been sent by the Commissioner. The answer of the First Circuit was as follows (176 F. 2d at 182):

> * * * The language of the statute itself refutes this argument. Section 272(d) gives the taxpayer the right to submit a waiver "at any time", and it is to the taxpayer's advantage to file a waiver to a proposed deficiency because I.R.C. § 292(a), 26 U.S.C.A. § 292(a), imposes interest on deficiencies at the rate of 6% per year from "the date prescribed for the payment of the tax * * * to the date the deficiency is assessed, or, in the case of a waiver under section 272(d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier." Several cases hold that a waiver to a proposed deficiency is effective to stop the running of interest thirty days after filing. [Citations omitted.] Furthermore, the right is given the taxpayer by § 272(d) "to waive the restrictions provided in subsection (a) of this

[4] And see *Diamond Alkali Co.* v. *Driscoll* (W.D. Pa.), decided June 13, 1940 (1940 C.C.H., par. 9526).

> section on the assessment and collection" of a deficiency; and reference back to § 272(a) discloses that the first of these "restrictions", or conditions which must be met before the Commissioner is authorized to make assessment and distraint, is the mailing to the taxpayer of a notice of the determination of a deficiency. As stated by Dean Griswold, a waiver to a proposed deficiency, under § 272(d), "allows the Commissioner to assess and collect the tax without first sending the taxpayer a deficiency letter which can be used as the basis for a petition in the Tax Court." Note, 57 Harv. L. Rev. 912, 914 n. 16 (1944).

The efficacy of a similar waiver, *i.e.*, a waiver executed in advance of any formal notice of deficiency, was also directly at issue in the *Moore* and *Roos* cases, *supra*. The precise question was whether execution of the waiver had been effective to stop the running of interest.[3] In both cases, it was held that the waiver did have that effect. In the *Moore* case, the Sixth Circuit declared (108 F. 2d at 659):

> The purpose of § 272(d) is obviously to permit the taxpayer to settle his tax liability and the government to get its money without delay where no controversy remains between the taxpayer and the Commissioner. In such cases the section offers a substantial inducement to the taxpayer to execute the waiver. If a waiver is of no avail until after final determination, there is little or no inducement to waive.

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[3] Taxpayers in those cases relied, respectively, upon the provisions of Section 292 of the Revenue Act of 1928, c. 852, 45 Stat. 791, and Section 274(j) of the Revenue Act of 1926, c. 27, 44 Stat. 9, which provided that where a waiver of the

2. We believe that the decision below is plainly in error.

Section 272(a) provides that where the Commissioner determines that there is a deficiency in income taxes, he shall send a notice of such deficiency to the taxpayer by registered mail; that the taxpayer may have 90 days thereafter in which to file a petition for redetermination of that deficiency by the Tax Court; and that "[n]o assessment of a deficiency" and "no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period * * *". Section 272(d) expressly provides that the taxpayer "at any time" shall have the right by a signed notice in writing filed with the Commissioner "to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency". The waiver (R. 14) signed by taxpayer recites that it is executed pursuant to the provisions of Section 272(d), that the restrictions provided in Section 272(a) are waived, and that consent is given to the assessment and collection of a specified deficiency. The decision below fails to give effect to the language of the waiver and to the provisions of Section 272(d).

3. In reenacting the provisions of Section 272(d) as Section 6213(d) of the Internal Revenue Code of 1954, Congress added, after the words "at any time", the

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restrictions on the assessment and collection of a deficiency in tax had been filed, interest could be collected only to the end of the 30-day period after the filing of such waiver or to the date the amount was assessed, whichever was the earlier.

parenthetical phrase "whether or not a notice of deficiency has been issued." Thus, Congress has apparently laid to rest, in relation to cases arising under the 1954 Code, any possible question as to the meaning of the phrase "at any time." The question presented by the instant petition nonetheless remains one of substantial practical importance because of the large number of cases arising under the 1939 Code which may be affected by the ruling below.

Waivers of the kind involved in this case are commonplace. And, as pointed out above, the Commissioner has regularly relied upon the proposition that when a taxpayer executes a waiver consenting to the assessment and collection of a particular deficiency, there is no requirement that a formal notice be issued as a condition precedent to collecting that acknowledged deficiency.

There are countless delinquent taxpayers.[6] In many of the cases in which back taxes remain unpaid, either in whole or in part, the assessment was made on the basis of a waiver of restrictions, that is to say, without resort to the 90-day-letter procedures. Accordingly, there are numerous taxpayers with outstanding income tax obligations arising under the 1939 Code who will now be in a position, at least in the area covered by the Ninth Circuit, to resist further collection on the same ground successfully urged in this case—that the waiver was ineffective and the

[6] It is estimated by the Internal Revenue Service that, as of December 31, 1958, there were more than a million and a quarter active delinquent accounts, of which approximately 900,000 involved unpaid income taxes.

assessment invalid.[7] In many, if not most, of these cases a new assessment would be barred by limitations.[8]

There is a further important factor. If the decision below stands uncorrected, there will doubtless be numerous suits for refund filed by taxpayers who paid their taxes subsequent to executing a waiver of restrictions under Section 272(d). The theory will be advanced that the waivers were invalid and that the collection of the taxes was illegal. We do not say that the Government will be without valid defenses to such suits, but we do apprehend that, at the very least, the decision below will encourage a large volume of vexatious litigation.

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[7] The defense might be made either in suits for unpaid taxes, such as that here involved, or in foreclosure proceedings falling within Section 7403 of the 1954 Code or 28 U.S.C. 2410.

[8] It is impracticable to determine the exact number of cases which may be affected by the rule enunciated in the instant case since such an estimate would require a detailed file-by-file examination of records located in the field. However, in light of the long-settled practice of making assessments without sending a deficiency letter in instances where a waiver has been executed, it can be stated with assurance that the number is substantial.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APRIL 1959.

APPENDIX

United States Court of Appeals for the Ninth Circuit
No. 15662, Jan. 2, 1959

UNITED STATES OF AMERICA, APPELLANT,

v.

SYDELLE PRICE, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Before STEPHENS, *Chief Judge,* and HEALY, POPE, FEE, CHAMBERS, BARNES, HAMLEY, HAMLIN, and JERTBERG, *Circuit Judges*

HAMLEY, *Circuit Judge:*

The United States brought this action against Sydelle Price to collect an asserted unpaid balance of federal income taxes. One of Mrs. Price's defenses was that since no notice of deficiency had been issued the suit was prohibited by statute. The government contended that Mrs. Price had waived this requirement. It was her position, however, that this requirement may not be waived, and that her purported waiver was therefore ineffective for this purpose.

The trial court adopted defendant's view, and entered judgment dismissing the action. The government appeals. The only question here presented is whether the statutory requirement that the Commissioner of Internal Revenue mail a notice of deficiency to the taxpayer as a condition precedent to the bringing of such an action had been effectively waived.

The facts to be considered in deciding this question are not in dispute and may be briefly stated. On August 10, 1946, Mrs. Price executed United States Treasury Form 870, which was received by the commissioner on August 18, 1949. In so far as here relevant, the form reads as follows:

> Sydelle Price
>
> Pursuant to the provisions of Section 272(d) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, the restrictions provided in Section 272(a) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, are hereby waived and consent is given to the assessment and collection of the following deficiency or deficiencies in tax:
>
> * * * * *
>
> Taxable year ended December 31, 1946, income tax in the sum of $9,965.48.
>
> * * * * *

On October 14, 1949, the commissioner assessed against Mrs. Price, for the taxable year 1946, the sum of $9,965.48 plus interest of $1,498.09, or a total of $11,463.57. On December 16, 1949, the commissioner issued to her a so-called "ninety-day letter" asserting deficiencies for 1946. The deficiencies referred to in this letter were for penalties under §§ 291(a) and 293(a) of the Internal Revenue Code of 1939, in the amounts of $2,491.37 and $498.27, respectively.[1] No deficiency in income tax for the taxable year of 1946 was asserted against the taxpayer in this letter, nor has any other notice of deficiency concerning that year been mailed to her.

On January 12, 1950, Mrs. Price paid to the commissioner the sum of $1,500 for the taxable year of

[1] All statutory references in this opinion are to the Internal Revenue Code of 1939, unless otherwise indicated.

1946. Of the amount assessed for the year 1946, as noted above, there then remained unpaid the sum of $9,963.57. This suit was brought to recover that amount.

Section 272(a), quoted in the margin,[2] requires that a notice of tax deficiency be mailed to the taxpayer as a condition precedent to the bringing of such a suit as this. Section 272(d) provides that the taxpayer may waive the restrictions provided in subsection (a).[3] The purported waiver which Mrs. Price signed and filed recites that it is made pursuant to § 272(d).

In *Mutual Lumber Co.* v. *Poe,* 9 Cir., 66 F. 2d 904, decided in 1933, this court held that a waiver prior

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[2] Section 272(a) as amended by the act of December 29, 1945, 59 Stat. 673, chap. 652, § 203, reads as follows:

"[(a)(1) Petition to The Tax Court of the United States.] If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia, as the ninetieth day) the taxpayer may file a petition with the Tax Court * * * for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *"

[3] Section 272(d) reads:

"(d) Waiver of restrictions. The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency."

to the mailing of a notice of deficiency is premature and invalid.[4] It was held in effect that the waiver contemplated by the statute amounts to a waiver of the right to petition the Tax Court for a redetermination, and since there can be no such petition until the taxpayer has received a notice of tax deficiency, there is nothing to waive until such a notice has been mailed.

The holding in Mutual was reaffirmed in *McCarthy Co.* v. *Commissioner of Internal Revenue,* 9 Cir., 80 F. 2d 618, decided in 1935. It was also followed in *East Bay Water Co.* v. *McLaughlin,* D.C.N.D. Cal., 24 F. Supp. 222, decided in 1938.[5]

The purport of these decisions, insofar as the present case is concerned, is that a taxpayer may not waive the requirement that a notice of tax deficiency be mailed to him. They therefore appear to be dispositive of the present appeal.

The government contends, however, that the Mutual and McCarthy decisions are not controlling here because they were concerned with the timeliness of the assessment, not the right to sue without first mailing a notice of deficiency. In both Mutual and McCarthy the question presented was whether a waiver prior to any deficiency notice prevented a subsequent notice of deficiency from tolling the statute of limitations on the assessment and collection of taxes.

It is true that in these earlier cases the significance to be attached to a holding that the waiver was invalid was different than it is here. In Mutual and McCarthy it was to the advantage of the government

[4] This case involved the effect of a waiver under § 274(d) of the Revenue Act of 1926. That section, however, corresponds with § 272(d) of the 1939 code.

[5] An appeal taken in that case was dismissed by stipulation, 104 F. 2d 1016.

to have the waivers declared invalid, while here the advantage of doing so lies in favor of the taxpayer. But the basic question is the same in all three cases—was the waiver valid when filed prior to the mailing of a notice of deficiency? If, as we held in Mutual and McCarthy, it was invalid and so rendered the subsequently filed notices effective in suspending the statute of limitations, it must likewise be invalid for any purpose. If invalid for any purpose, it did not relieve the commissioner from the statutory requirement of mailing a notice prior to commencing this suit.

The government further argues that the rule laid down in these earlier cases was repudiated in *Monge* v. *Smyth*, 9 Cir., 229 F. 2d 361.

The taxpayer there sought to enjoin the collection of taxes and penalties. The government moved to dismiss the appeal on the ground that the court was without jurisdiction to entertain the action. The statute relied upon by the government was 26 U.S.C.A., § 3653(a), which provides:

> Except as provided in section 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

The motion to dismiss was granted, and the taxpayer appealed. He sought to avoid the effect of 26 U.S.C.A., § 3653(a) by bringing himself within the exception provided in § 272(a). Under that exception (see footnote 2), the making of an assessment or the beginning of a proceeding or distraint during the time the prohibition of § 272(a) is in force "may be enjoined by a proceeding in the proper court." The prohibition referred to forbids the commissioner from making an assessment of a deficiency, or beginning or prosecuting a distraint or proceeding in court for its

collection, until a notice of deficiency has been mailed and until the expiration of ninety days thereafter, and, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final.

Invoking these statutory provisions, the taxpayer contended that the prohibition of § 272(a) was in force, and the proceeding to collect the taxes could therefore be enjoined because no notice of deficiency had been issued. The court rejected this contention, holding that a waiver which the taxpayer had signed on U.S. Treasury Form 870 TS obviated the need for sending the formal notice.

If the waiver form signed in Monge is the legal equivalent of the waiver form signed in Mutual and McCarthy (and the instant case), the Monge case unquestionably announces a rule contrary to that stated in the earlier decisions. The taxpayer argues strenuously that the waiver forms are not equivalents. The government takes the opposite position.

We need not resolve this question, however, since careful analysis of the Monge opinion indicates that all that was said concerning the validity of the waiver is dictum. The court there stated, in the last paragraph of its opinion, that a deficiency notice had been sent to the taxpayer, and that the distraint proceedings sought to be enjoined had not been commenced until more than ninety days thereafter. This being so, the exception to 26 U.S.C.A., § 3653, on which the taxpayer relied, had no application, and dismissal of the taxpayer's suit for lack of jurisdiction was properly affirmed for that reason.

The prior decisions of this court cannot be overruled by dictum contained in a subsequent opinion. The rule announced in Mutual and McCarthy still stands.

The government asks us to re-examine that rule at this time. In this connection our attention is called to the language of the statutes in question, certain legislative history, and the decisions in other circuits adopting a contrary rule.[6]

We have reviewed the authorities mentioned, but have found nothing to convince us that we should now upset the long-standing rule of this circuit. It may also be noted that the desirability of achieving uniformity among the circuits is no longer an incentive for such an undertaking. Section 6213(d) of the 1954 Internal Revenue Code effectuates an amendment of § 272(d) to provide expressly that a waiver may be effective "whether or not a notice of deficiency has been issued."

Affirmed.

(Endorsed:) Opinion. Filed Jan. 2, 1959.

PAUL P. O'BRIEN, *Clerk.*

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[6] *Moore* v. *Cleveland Ry. Co.*, 6 Cir., 108 F. 2d 656; *Associated Mutuals* v. *Delaney*, 1 Cir., 176 F. 2d 179.

United States Court of Appeals for the Ninth Circuit

No. 15662

UNITED STATES OF AMERICA, APPELLANT

v.

SYDELLE PRICE, APPELLEE

Judgment

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed:) Judgment. Filed and entered January 2, 1959.

PAUL P. O'BRIEN, *Clerk.*

U. S. GOVERNMENT PRINTING OFFICE: 1959